

Not To Be Published:

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

NORTH CENTRAL CONSTRUCTION,

Plaintiff,

vs.

SIOUXLAND ENERGY AND
LIVESTOCK COOPERATIVE,

Defendant.

No. C02-4041-MWB

**MEMORANDUM OPINION AND
ORDER REGARDING PLAINTIFF'S
MOTION TO MODIFY, CORRECT
OR VACATE ARBITRATION
AWARD RE: ATTORNEYS' FEES;
APPLICATION FOR AWARD OF
ATTORNEYS' FEES; AND MOTION
TO CONFIRM ARBITRATION
AWARD AND REQUEST FOR
ENTRY OF JUDGMENT OF
FORECLOSURE**

TABLE OF CONTENTS

<i>I. INTRODUCTION AND BACKGROUND</i>	<i>2</i>
<i>II. LEGAL ANALYSIS</i>	<i>6</i>
<i>A. Modification, Correction Or Vacation Of The Arbitration Award</i>	<i>6</i>
1. <i>Arguments of the parties</i>	<i>6</i>
2. <i>The law</i>	<i>8</i>
3. <i>Resolution</i>	<i>12</i>
<i>B. Confirmation</i>	<i>20</i>
1. <i>Arguments of the parties</i>	<i>20</i>
2. <i>Resolution</i>	<i>21</i>
<i>C. Post-Arbitration Attorneys' Fees</i>	<i>23</i>

1.	<i>Arguments of the parties</i>	23
2.	<i>Resolution</i>	24
III. CONCLUSION		25

I. INTRODUCTION AND BACKGROUND

On May 17, 2002, plaintiff North Central Construction (“NCC”) filed a petition in the Iowa District Court in and for Sioux County seeking foreclosure of its perfected mechanic’s lien in the amount of \$2,708,293.00. Specifically, the petition asserted that NCC entered into a written contract with defendant Siouxland Energy and Livestock Cooperative (“SELC”) for the construction of an ethanol plant on real estate owned by SELC. NCC alleged that it had performed all labor and furnished all materials necessary to exact the requested improvements upon SELC’s real estate—and demanded immediate payment of amounts due and owing to it for performance of these services. (Doc. No. 1). On June 12, 2002, SELC removed the matter to this court asserting that complete diversity existed between the parties and that the amount in controversy was well in excess of the statutory jurisdictional amount of \$75,000.00. *See* 28 U.S.C. § 1332. On June 14, 2002, SELC filed its answer and asserted a counterclaim of breach of contract. (Doc. No. 5). On June 24, 2002, NCC filed a reply to SELC’s counterclaim (Doc. No. 6)—which it later amended to include several affirmative defenses. (Doc. No. 7).

On September 5, 2002, NCC filed its Notice of Motion and Motion to Stay Litigation and Compel Arbitration (Doc. No. 10), contending that the claims asserted in this matter fell within the scope of a valid arbitration agreement between the parties. Following briefing by the parties, in person oral arguments on NCC’s motion were held

on November 7, 2002. On November 12, 2002, this court entered an order staying the litigation pending arbitration according to the parties' contract. (Doc. No. 23). Accordingly, the case was stayed, and the parties submitted the matter to the Construction Industry Arbitration Tribunal of the American Arbitration Association ("AAA") for resolution. (Doc. No. 26).

On January 20, 2004, the arbitration panel entered its decision for NCC as to a portion of its claim, and denied SELC's counterclaim. The panel specifically stated that it denied NCC's request for attorneys' fees, *see* Arbitration Award, Doc. No. 32, Exh. 1, at 6 ("The Arbitrators deny all remaining portions of NCC's claim for additional costs, including its request for attorneys' fees."), and entered the following award:

North Central Construction is awarded \$992,979.13

. . . .

In addition, North Central Construction is awarded pre-award interest at the rate of 6% on the sum of \$592,979.13, commencing April 15, 2002, and pre-award interest at the same rate on the sum of \$400,000.00 commencing August 15, 2002.

The above-sums are to be paid on or before thirty (30) days from the date of this final award. If such sums are not paid on or before thirty (30) days from the date of this award, such sums shall bear interest at the rate of 6% per annum until paid in full.

The administrative fees, arbitrators' compensation and expenses of the American Arbitration Association shall be borne, as incurred by the parties. *We do not award either party attorneys' fees or expert witness fees.*

Id. at 7 (emphasis added).

On January 21, 2004, NCC submitted a request to the arbitrators to amend the award to correct what NCC perceived as a 'misstatement of fact.' Specifically, NCC objected to the panel's denial of attorneys' fees—contending that NCC never submitted the

issue of attorneys' fees for arbitration and that the arbitration panel was therefore without authority to rule upon the issue. On January 29, 2004, SELC submitted its response to NCC's argument to the arbitrators—in this response SELC referred the arbitrators to various filings and statements by NCC which SELC argued indicated that the issue of attorneys' fees was indeed before the arbitration panel for resolution. On January 30, 2004, NCC submitted a reply to the arbitrators in which it claimed to have explicitly reserved its claim for attorneys' fees for the mechanic's lien foreclosure proceeding in its pre-hearing brief in which NCC stated: "NCC reserves the right to prove its claim for attorneys' fees through post-hearing submissions in the pending mechanic's lien foreclosure action." On February 2, 2004, after consideration of the parties' respective arguments, the arbitration panel denied NCC's request to clarify the final award.

Following the arbitration panel's refusal to modify the award, NCC filed a series of motions with this court seeking various relief:

- Motion to Confirm Arbitration Award and Request for Entry of Judgment of Foreclosure (Doc. No. 28)—requesting the court to (1) confirm the arbitration award, with the exception of the attorneys' fee issue; (2) enter judgment against SELC in the amount of \$1,090,240.20 plus interest at a rate of 6% per annum commencing February 19, 2004; (3) award NCC attorneys' fees; and (4) enter a Decree of Foreclosure with respect to the property subject to NCC's mechanic's lien.
- Motion for Leave to Amend Answer to Counterclaim to Assert Counterclaim (Doc. No. 30)—requesting the court grant NCC leave to amend its answer to SELC's counterclaim to assert its own counterclaim for breach of contract in order to obtain a personal judgment against SELC for the amount of the arbitration panel's

award plus interest, attorneys' fees and costs.

- Motion to Modify, Correct or Vacate Arbitration Award Re: Attorneys' Fees (Doc. No. 32)—moving the court, pursuant to 9 U.S.C. §§ 10(a)(4) and 11(b) to enter an order modifying, correcting, or vacating the arbitration award to delete all references to any purported decision on NCC's statutory claim for attorneys' fees.
- Application for Award of Attorneys' Fees (Doc. No. 36)—asserting its entitlement to \$172,954.00 in attorneys' fees under Iowa Code § 572.32, and yet to be determined post-arbitration attorneys' fees.

On April 1, 2004, SELC filed a consolidated resistance to all of NCC's pending motions. (Doc. No. 40). On April 8, 2004, NCC filed a reply to SELC's resistance. In its reply, NCC acknowledged that SELC had paid the amount awarded plus interest, and therefore withdrew its Motion for Leave to Amend Answer to Counterclaim (Doc. No. 30), but continued to assert that the arbitration award should be modified to delete any disposition of NCC's attorneys' fees claim and that the court should award NCC its attorneys' fees. NCC proceeded to submit various affidavits in support of its post-arbitration attorneys' fees claim.

On June 14, 2004, NCC filed a Motion to Lift Stay and Request for Ruling on Pending Matters (Doc. No. 43) in which it informed the court that arbitration was completed, and requested that the stay be lifted and that the court rule on matters pending before it. On June 15, 2004, the court granted NCC's motion and lifted the stay. (Doc. No. 44). The court also granted NCC's request to withdraw its pending motion for leave to amend its answer to SELC's counterclaim. *Id.*

The remaining pending motions have been thoroughly briefed and are ready for

determination by this court.

II. LEGAL ANALYSIS

Four issues are remaining which require resolution by this court—(1) should the arbitration award, to the extent it denies attorneys’ fees, be modified, vacated or corrected; (2) if so, what is the appropriate award of attorneys’ fees to NCC; (3) should the arbitration award, except for the denial of attorneys’ fees, be confirmed; and (4) is NCC entitled to post-arbitration attorneys’ fees. The court will address these issues in turn.

A. Modification, Correction Or Vacation Of The Arbitration Award

1. Arguments of the parties

NCC asserts that as it specifically reserved the right to seek attorneys’ fees in this court in its pre-hearing brief, and as neither party presented evidence or argument regarding attorneys’ fees at the arbitration hearing, the matter of attorneys’ fees was not properly before the arbitration panel for resolution. Accordingly, NCC asserts that the court has the power to correct, modify, or vacate the portion of the arbitration award denying attorneys’ fees as the arbitrators exceeded their powers under 9 U.S.C. § 10(a)(4), and “awarded on a matter not submitted to them” within the meaning of 9 U.S.C. § 11(b). Other than the statutory language, NCC relies primarily on the case of *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186 (11th Cir. 1995)—in which the Eleventh Circuit Court of Appeals found that the arbitrators exceeded the scope of their powers in ruling on the issue of attorneys’s fees where the plaintiff never submitted the issue of attorneys’ fees to the arbitration panel. *Id.* at 1194-95.

In resistance, SELC contends that the totality of the record establishes that the question of attorneys’ fees was squarely before the arbitration panel. Specifically, SELC

details the following statements and actions:

- May 17th 2002: NCC files Petition in Iowa District Court of Sioux County seeking, amongst other things, reasonable **attorney's fees** . . . ; . . .
- July 10, 2002: NCC answers the counterclaim and again requests **attorney's fees** as part of its claims;
- September 5, 2002: NCC seeks to stay federal court proceedings and have all "unresolved claims" submitted to binding arbitration;
- November 12, 2002: this Court grants NCC's motion and directs that all claims be submitted to arbitration;
- December 16, 2002: NCC files its Demand for Arbitration and seeks to be awarded \$3,375,695.52 "plus interests, costs and disbursement **including attorneys fees**";
- July 15, 2003: the arbitrators enter an Amended Scheduling Order requiring the parties to specify their claims by July 21, 2003 . . . ;
- July 21, 2003: NCC files a Statement of Claim seeking, amongst other things, **attorney's fees**. This Statement of Claim was never amended or modified throughout the remainder of the proceedings;
- September 22, 2003: the arbitrators enter a Third Amended Scheduling Order providing the parties the discretion to file a "pre-hearing brief on significant disputed issues";
- October 27, 2003: NCC chooses to file a pre-hearing brief which at page 11 contains the language: "NCC reserves the right to prove it's claim for attorney's fees through post hearing submissions in the pending mechanic's lien foreclosure action.";
- November 9, 2003: NCC submits a Stipulation of Facts that, amongst other things, indicates NCC "currently seeks . . . **attorneys' fees**.";
- January 20, 2004: the Award is issued and provides "[t]he Arbitrators deny all remaining portions of NCC's

claim for additional costs, including its **request for attorneys' fees.**" The panel also stated: [w]e do not award either party **attorneys' fees . . .**"

Resistance at pp. 7-8 (emphasis in original). From this outline of events, SELC points out that NCC expressly claimed attorneys' fees as part of its damages in five instances prior to the issuance of the arbitrators' award. SELC argues that NCC's single isolated statement in its pre-hearing brief cannot provide a basis to recast the issues before the arbitration panel. Further, relying on *Executone Information Systems, Inc. v. Davis*, 26 F.3d 1314, 1320 (5th Cir. 1994), SELC claims that as the arbitration panel clearly believed the issue of attorneys' fees was before them, that belief is given much deference and the issue of attorneys' fees should be presumed submitted to the panel. Finally, SELC distinguishes the authority cited by NCC as supporting modification of the award, and requests the court deny NCC its attempt to take "a second bite of the apple." Resistance to Motion to Modify or Vacate Arbitration Award, Application for Fees, Motion for Leave to Amend, and for Confirmation of Award ("Resistance"), Doc. No. 40, at pp. 11.

In reply, NCC did not take issue with the chronology of filings set forth by SELC, but asserted that its pre-hearing brief statement coupled with the fact that it did not present any evidence or argument regarding attorneys' fees at the arbitration hearing and did not request attorneys' fees in its post-hearing brief illustrates that the issue of attorneys' fees was not properly before the arbitration panel for resolution.

2. The law

The Eighth Circuit Court of Appeals recently discussed the deference to be given to an arbitration award, and the situations in which a district court can modify, vacate or correct an arbitration award:

When reviewing an arbitral award, courts accord "an

extraordinary level of deference" to the underlying award itself, *Keebler Co. v. Milk Drivers & Dairy Employees Union, Local No. 471*, 80 F.3d 284, 287 (8th Cir. 1996), because federal courts are not authorized to reconsider the merits of an arbitral award "even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." *Bureau of Engraving, Inc. v. Graphic Communication Int'l Union, Local 1B*, 284 F.3d 821, 824 (8th Cir. 2002) (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987)). Indeed, an award must be confirmed even if a court is convinced the arbitrator committed a serious error, so "long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority." *Bureau of Engraving*, 284 F.3d at 824 (quoting *Misco*, 484 U.S. at 38).

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, established "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). Thus, the FAA only allows a district court to vacate an arbitration award

- (1) Where the award was procured by corruption, fraud, or undue means.
- (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
- (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

Similarly, under 9 U.S.C. § 11 a reviewing court may only modify the arbitrator's award

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

9 U.S.C. § 11.

A “district court must take the award as it finds it and either vacate the entire award using section 10 or modify the award using section 11.” *Legion Ins. Co. v. VCW, Inc.*, 198 F.3d 718, 721 (8th Cir. 1999). The deference owed to arbitration awards, however, “is not the equivalent of a grant of limitless power,” *Leed Architectural Prods., Inc. v. United Steelworkers of Am., Local 6674*, 916 F.2d 63, 65 (2d Cir. 1990), and “courts are neither entitled nor encouraged simply to ‘rubber stamp’ the interpretations and decisions of arbitrators.” *Matteson v. Ryder Sys. Inc.*, 99 F.3d 108, 113 (3d Cir. 1996). Thus, courts may also vacate arbitral awards which are “completely irrational” or “evidence[] a manifest disregard for the law.” *Hoffman v. Cargill Inc.*, 236 F.3d 458, 461 (8th Cir. 2001) (internal quotations and citations omitted).

Stark v. Sandberg, Phoenix & von Gontard, P.C., 381 F.3d 793, 798-99 (8th Cir. 2004).

“Judicial review of an arbitration award is extremely limited.” *Kiernan v. Piper Jaffray Companies, Inc.*, 137 F.3d 588, 591 (8th Cir. 1998).

Other than the statutory authority of 9 U.S.C. §§ 10(a)(4) and 11(b), NCC relies principally on the case of *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186 (11th Cir. 1995), in support of its position that the arbitrators’ disposition of the attorneys’ fees issue

exceeded their powers and authority. In *Davis*, the plaintiff initiated arbitration against the defendant securities corporations asserting claims of fraud, breach of fiduciary duty, negligence, and violations of both federal securities laws and Florida’s Blue Sky Laws. *Id.* at 1187. In his Statement of Claim, the plaintiff sought relief in the form of compensatory damages, punitive damages, rescission, prejudgment interest and costs. *Id.* The plaintiff “*did not* claim attorneys’ fees, and neither party presented any evidence or argument on the issue of attorneys’ fees” at the arbitration hearing. *Id.* (emphasis added). Ultimately, the arbitration panel awarded the plaintiff compensatory damages and punitive damages, but stated that each party was to bear their own costs and attorneys’ fees. *Id.* The plaintiff then filed¹ a petition to confirm the award, a motion for attorneys’ fees, and a motion for modification or correction of the award, or alternatively, a motion to vacate the award only with respect to the arbitrators ruling on attorneys’ fees. *Id.* at 1188. The district court granted the motion to confirm the award, but denied the motions to modify or correct the award as to attorneys’ fees on the grounds that the arbitration panel was aware of the state statute allowing for attorneys’ fees when it issued the award. *Id.*

The plaintiff appealed to the Eleventh Circuit Court of Appeals claiming, among other things, “that he had never submitted the issue of entitlement or amount of attorneys’ fees to the arbitrators.” *Id.* at 1194. The defendant argued that the issue of attorneys’ fees was submitted because (1) the Statement of Claim requested “costs”; (2) the plaintiff gave the arbitration panel a copy of the state statute in issue, and failed to redact the section on attorneys’ fees; and (3) the plaintiff gave the arbitration panel a copy of a case that addressed punitive damages and held that arbitrators had the authority to award attorneys’

¹The plaintiff originally filed the petition and motions in a state court, but invoking diversity of citizenship jurisdiction under 28 U.S.C. § 1332, the defendants removed the matter to federal district court. *Id.* at 1188.

fees. *Id.* at 1195. The Eleventh Circuit resolved the issue as follows:

We do not believe that these actions amount to a submission of the issue of attorneys' fees for determination. The Statement of Claim makes no request for attorneys' fees, and neither party presented evidence or argument on the issue. Moreover, the statute and case law provided by [the plaintiff] to the arbitrators were primarily relevant to the calculation of compensatory and punitive damages. The mere fact that the arbitration panel was aware of a statute that provides for an award of attorneys' fees does not constitute a submission of the issue by the parties for determination. Accordingly, the attorneys' fees issue was not submitted to the arbitrators, and the arbitrators therefore exceeded their powers in deciding the issue. 9 U.S.C. § 10(a)(4).

Id. The Eleventh Circuit went on to vacate the district court's judgment insofar as it confirmed the arbitrators' determination of attorneys' fees. *Id.*

3. Resolution

A review of the facts surrounding this case, as pertain to the issue of attorneys' fees, illustrates that the arbitrators' award denying NCC's claim for attorneys' fees and requiring each party to bear their own costs and attorneys' fees should not be vacated, modified or corrected. At the outset, despite knowing of the arbitration provision in the governing contract, NCC decided to invoke the judicial process by seeking to foreclose on its mechanic's lien in state court. Following SELC's removal of the action to this court, and the filing of its answer and counterclaim, NCC then moved this court to compel arbitration and stay the litigation pending the outcome of the arbitration. In so moving, NCC additionally requested the court award it attorneys' fees generated by the bringing

of the motion,² but never requested that the issue of attorneys' fees be saved for determination by the court following arbitration. Though NCC acted contrary to its right to arbitration under the agreement by invoking the judicial process, because the delay caused was minimal, NCC's motion was granted and the parties were compelled to arbitrate the conflict and the matter was stayed: "[D]espite the fact that North Central could have, *and in the court's view should have*, proceeded to arbitration before it sought to foreclose on its mechanic's lien, the delay caused was minimal seeing as North Central filed suit in May 2002 and asserted its right to arbitration in July 2002." Memorandum Opinion and Order Regarding Plaintiff's Motion to Compel Arbitration and Stay Proceedings Pending Arbitration, Doc. No. 23, at 13 ("Order"). This court ordered the parties to arbitration pursuant to Article 14 of the General Provisions of the parties' contract, which states:

14.1.2 All unresolved disputes relating to this Contract or the breach thereof ("disputes") shall be decided by arbitration in Des Moines, Iowa

Answer and Counterclaim, Doc. No. 5, Exh. A at 57. Attorneys' fees were not awarded to NCC, and as the parties' contract required arbitration of *all disputes* arising from the agreement, the court did not 'reserve' *any* issues for post-arbitration determination by the

²NCC concluded its supporting memorandum with the following statement:
Plaintiff North Central respectfully requests that the Court grant its Motion to Stay Litigation until Arbitration has been held in accordance with the terms of the parties' arbitration agreement and award North Central *its costs and attorneys' fees* incurred in bringing this Motion, together with such other and further relief as the Court deem appropriate.

Memorandum of Law Supporting Plaintiff's Motion to Stay Litigation and Compel Arbitration, Doc. No. 11, at 18.

court. Neither party challenged the court's order.

On December 16, 2002, NCC filed a Demand for Arbitration in which it indicated the following in the space entitled "DOLLAR AMOUNT OF CLAIM":

\$3,375,695.52 plus interest, costs and disbursements *including attorneys' fees*.

Resistance, Exh. B (emphasis added). On July 21, 2003, NCC filed its Statement of Claim, in which it claimed the following as relates to attorneys' fees:

4. Attorney's fees costs and disbursements. NCC reserves the right to claim and present proof of its attorney's fees, costs and disbursements at the hearing in accordance with applicable law.

Resistance, Exh. D at 2. In its pre-hearing brief, filed October 27, 2003, NCC attempted to reserve the issue of attorneys' fees for post-arbitration determination by this court:

NCC is also entitled to recover its attorneys' fees if it prevails. Iowa Statutes § 572.32 allows a prevailing mechanic's lien plaintiff to recover its attorneys' fees. Iowa Stat. § 572.32 (2001). NCC reserves the right to prove its claim for attorneys' fees through post-hearing submissions in the pending mechanic's lien foreclosure action.

Resistance, Exh. F at 11. Thereafter, in its stipulation of uncontested facts, filed November 9, 2003, NCC asserted the following:

NCC currently seeks \$1,026,005.52 for its unpaid invoices and an additional \$2,367,410 in unpaid extra work, plus interest, costs and *attorneys' fees*.

Resistance, Exh. G at 4 (emphasis added). After the arbitration panel denied NCC attorneys' fees, NCC came back to this court claiming that the arbitrators had exceeded their authority, that the portion of the award stating that each party must absorb their own attorneys' fees should be vacated, and seeking an award of attorneys' fees from this court.

Despite NCC's assertions otherwise, this court finds *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186 (11th Cir. 1995), distinguishable from this matter in two key respects. First, in *Davis* the plaintiff claimed only 'costs,' and never mentioned attorneys' fees, in the Statement of Claim, or any other arbitration documents. *Davis*, 59 F.3d at 1194. NCC, on the other hand, purported to 'reserve the right' to present evidence on attorneys' fees at the arbitration hearing in its Statement of Claim, and claimed attorneys' fees in at least two other documents filed with the arbitration panel. In *Davis*, the plaintiff proceeded initially under the governing arbitration clause, and only availed himself of the judicial process following the arbitration panel's ruling. In this case, NCC invoked the judicial process by filing an action for foreclosure of its perfected mechanic's lien despite knowledge of the mandatory mediation & arbitration provisions in the contract—in fact, this court previously noted that had NCC "desired merely to preserve its mechanic's lien rights, it could have done so by simply filing a statement of account in accord with Iowa Code section 572.8." Order at 13. Further, NCC moved this court to compel arbitration pursuant to the arbitration provision of the parties' contract requiring arbitration of "[a]ll unresolved disputes relating to [the] [c]ontract"—which this court granted. NCC then went on to claim attorneys' fees as part of the relief sought in documents filed with the arbitration panel. Clearly, unlike *Davis*, the arbitration panel in this instance was aware of the issue of attorneys' fees due to more than just familiarity with the state statute under which attorneys' fees could be awarded—the court's order compelling arbitration, the arbitration provision of the contract, and NCC's claims for attorneys' fees in arbitration documents informed the arbitration panel that the issue was before it. *See Davis*, 59 F.3d at 1195. These key differences distinguish NCC's position from that of the plaintiff in *Davis* to the degree that the holding in *Davis* is not controlling here—this is not a case in which the plaintiff submitted only the issue of 'costs' or in which the arbitration panel was

only casually aware of a statute which allowed an award of attorneys' fees to the prevailing party.

NCC initiated this action with full knowledge of an arbitration clause that required arbitration of "[a]ll unresolved disputes relating to [the] [c]ontract." NCC then moved this court to compel arbitration pursuant to that very arbitration clause. At no time did NCC ask this court to compel arbitration as to all issues *except* attorneys' fees—a position which, had it been asserted, this court would have rejected due to the *express language* of the parties' contract requiring arbitration of *all unresolved disputes and issues* arising from the parties' contractual relationship:

In any judicial proceeding to enforce this Agreement to arbitrate, the *only issues* to be determined shall be those set forth in 9 U.S.C. Section 4 Federal Arbitration Act, and such issues shall be determined by the Court without a jury. *All other issues, such as but not limited to*, arbitrability (sic), prerequisites to arbitration, compliance with contractual time limits, applicability of indemnity clauses, clauses limiting damages and statutes of limitations shall be for the arbitrator(s), whose decision thereon shall be final and binding.

Answer and Counterclaim, Doc. No. 5, Exh. A, § 14.1.5 at 58 (emphasis added). In subsequently ordering the parties to arbitration pursuant to Article 14 of the General Provisions of the parties' contract, without reserving *any* issue for post-arbitration determination, the court was giving effect to the express language of the arbitration provisions mandating arbitration of *all* issues and disputes arising from the contract. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983) ("[t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."); *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., U.S.A.*, 334

F.3d 721, 726 (8th Cir. 2003) (recognizing that it is for the court to decide whether the parties agreed to arbitrate a particular dispute); *Fleet Boston Robertson Stephens, Inc. v. Innovex, Inc.*, 264 F.3d 770, 773 (8th Cir. 2001) (“where the parties have agreed to arbitrate, there is a strong federal policy in favor of arbitration); *Telectronics Pacing Sys., Inc. v. Guidant Corp.*, 143 F.3d 428, 433 (8th Cir. 1998) (“[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.”) (quoting *AT & T Tech., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650, 106 S. Ct. 1415, 1419, 89 L. Ed. 2d 648 (1986)) (quotation and citation omitted). Further, a close reading of the arbitration provision cited above clearly indicates that arbitrability of *all issues*, other than those contained in 9 U.S.C. § 4—relating to petitioning a district court to compel arbitration, is to be decided by the arbitrators. See Answer and Counterclaim, Doc. No. 5, Exh. A, § 14.1.5 at 58 (“*All other issues, such as but not limited to, arbitrability (sic) . . . shall be for the arbitrator(s), whose decision thereon shall be final and binding.*”) (emphasis added); compare *Schlobohm v. Pepperidge Farm, Inc.*, 806 F.2d 578, 581 (5th Cir. 1986) (finding that district court was not precluded by the FAA from awarding attorney’s fees, costs and interest where “[t]he parties did not agree to submit to arbitration the entire dispute between them arising from the contract,” but noting that if the arbitration clause had required arbitration of any dispute arising from the contract, “any award of attorney’s fees, interest, and costs was necessarily submitted to the arbitrators and a district court that made such an award would be impermissibly modifying the arbitrators’ decision.”).

NCC’s single statement in its pre-hearing brief purporting to ‘reserve’ the issue of attorneys’ fees for post-arbitration determination by this court cannot overcome the following matters indicating that the issue of attorneys’ fees was, in fact, submitted to the

arbitration panel: (1) the contract’s specific language requiring arbitration of *all* issues and disputes arising from the contract, and giving the arbitrators the authority to determine the arbitrability of any specific dispute; (2) the court’s ruling compelling arbitration pursuant to the parties’ contract—namely, that all unresolved issues be submitted for arbitration; and (3) NCC’s claim for attorneys’ fees in the demand for arbitration, Statement of Claim, and stipulation of uncontested facts. Additionally, the court does not find persuasive the fact that NCC did not present evidence or argument regarding attorneys’ fees to the panel. NCC cannot thwart the arbitration process, and have the issue of attorneys’ fees redetermined, merely because it failed in its duty to present evidence as to an issue it raised in its filings with the arbitration panel. It is neither the duty of the arbitration panel, or this court, to protect NCC’s attorneys’ fees claim—that duty falls squarely with NCC. NCC’s failure to present evidence on attorneys’ fees to the arbitration panel has no impact, under these circumstances, as to whether the issue was *actually* submitted for arbitration. In fact, the posture of this case leads the court to find that granting NCC’s motion to vacate, modify or correct the arbitration panel’s award with respect to attorneys’ fees would pervert the very principles underlying arbitration. *See Hoffman v. Cargill Inc.*, 236 F.3d 458, 461 (8th Cir. 2001) (“Arbitration is designed primarily to avoid the complex, time-consuming and costly alternative of litigation.”). As the Supreme Court has stated:

Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate.

Southland Corp. v. Keating, 465 U.S. 1, 7, 104 S. Ct. 852, 79 L. Ed. 1 (1984); *see Advanced Tech. Assocs., Inc. v. Seligman*, 39 F. Supp. 2d 1311, 1316 (D. Kan. 1999) (“plaintiff may not voluntarily submit a claim to arbitration, await the outcome, and then, if the decision is unfavorable, claim the arbitrator exceeded his powers in ruling on the

submitted claim.”). “Parties should be aware that they get what they bargain for and that arbitration is far different from adjudication.” *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 751 n.12 (8th Cir. 1986); *see Hoffman*, 236 F.3d at 463 (“Having entered such a contract [with an arbitration clause], a party must subsequently abide by the rules to which it agreed.”).

For all of these reasons, the court declines NCC’s invitation “to invade the province of the [arbitration] panel and re-adjudicate this [portion of the] dispute on the merits.” *UHC Mgmt. Co. Inc. v. Computer Sciences Corp.*, 148 F.3d 992, 998 (8th Cir. 1998). NCC’s Motion to Modify, Correct or Vacate Arbitration Award Re: Attorneys’ Fees is **denied**.³ Likewise, as the arbitration award as to attorneys’ fees will not be disturbed, the

³NCC also appears to claim that the arbitrators’ award, inasmuch as it ruled on attorneys’ fees, violates Iowa Code § 679A.10, which provides:

Unless otherwise provided in the agreement to arbitrate, and *except for counsel fees*, the arbitrators’ expenses and fees and any other expenses incurred in the conduct of the arbitration shall be paid as provided for in the award.

IOWA CODE § 679A.10 (emphasis added). NCC interprets this provision to permit an arbitration panel to award attorneys’ fees only if the parties had agreed to submit the issue to the panel. *See* Motion to Modify, Correct or Vacate Arbitration Award Re: Attorneys’ Fees, Doc. No. 32, at 2 (citing *Lee B. Stern & Co. v. Zimmerman*, 660 N.E.2d 170, 172 (Ill. Ct. App. 1995)). SELC argues that as NCC did submit the issue of attorneys’ fees to the arbitration panel, nothing about the award violates Iowa law and a discussion of Iowa Code § 679A.10 at this juncture is purely academic. The court has already determined that NCC submitted the issue of attorneys’ fees to the arbitration panel. Even the case cited by NCC, which deals with the interpretation of an Illinois statute that is similar to Iowa Code § 679A.10, notes that “the statute neither permits or prohibits the arbitrators’ assessment of attorney fees[—] [r]ather, the Act delegates this decision to the parties.” *Lee B. Stern & Co.*, 660 N.E.2d at 172. The court therefore adopts SELC’s
(continued...)

arbitration panel's denial of NCC's claim for attorneys' fees stands, and NCC's Application for Award of Attorneys' Fees, to the extent it requests fees generated prior to the arbitration panel's award,⁴ is rendered **moot**.

B. Confirmation

1. Arguments of the parties

In its Motion to Confirm Arbitration Award and Request for Entry of Judgment of Foreclosure, NCC argues that the arbitration award should be confirmed pursuant to 9 U.S.C. § 9 and Iowa Code §§ 679A.11 and 679A.14, with the exception of the arbitration panel's 'purported' denial of attorneys' fees. SELC argues that as it has already paid the full amount of the arbitration award, including interest, the request is moot and should be

³(...continued)

position that as the parties agreed to submit the issue of attorneys' fees to the arbitration panel, the arbitration award does not violate Iowa Code § 679A.10.

⁴In its Application for Attorneys' Fees, NCC claims it is entitled to \$11,550.00 in attorneys' fees it incurred prior to this court's order compelling arbitration and staying the litigation, and boldly asserts that "[t]he arbitrators clearly would have no authority to determine either entitlement to or the amount of attorneys' fees incurred in this Court before arbitration. . . ." Application for Award of Attorneys' Fees, Doc. No. 34, at 9. NCC cites *no* authority in support of this position, and provides *no* explanation as to why the arbitration panel would not have authority to award attorneys' fees incurred pre-arbitration. Through its own research, the court has not found anything in support of NCC's position that an arbitration panel to whom the issue of attorneys' fees is submitted by the parties does not have the authority to consider pre-arbitration attorneys's fees. *Cf. C.T. Shipping, Ltd. v. DES MOINES, IOWA (U.S.A.) Ltd.*, 774 F. Supp. 146, 152-53 (S.D.N.Y. 1991) (finding, in maritime case, arbitrators did not exceed their authority in awarding attorneys' fees related to pre-arbitration attachment proceedings). Therefore, the court rejects NCC's position and holds that the issue of any attorneys' fees incurred prior to the arbitration panel's issuance of the final award was submitted and properly before the arbitration panel.

denied. Further, SELC asserts that as nothing more than summary confirmation is warranted in this case, NCC's motion seeking selective confirmation of the arbitration award should be denied.

2. Resolution

Section 9, of Title 9 of the United States Code governs confirmation of arbitration awards, and provides as follows:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, . . . , then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.

9 U.S.C. § 9 (2004). A district court that had diversity jurisdiction over the action, then subsequently stayed the action pending arbitration pursuant to 9 U.S.C. § 3, has both the power, and the jurisdiction, to confirm any resulting arbitration award. *Smart v. Sunshine Potato Flakes, L.L.C.*, 307 F.3d 684, 685 (8th Cir. 2002); *see also Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 193, 203, 120 S. Ct. 1331, 146 L. Ed. 2d 171 (2000) ("the court with the power to stay the action under [9 U.S.C.] § 3 has the further power to confirm any ensuing arbitration award). "In the Eighth Circuit, parties must have an *express affirmative agreement* providing for judicial confirmation of an award for a federal court to have authority under section 9 of the FAA to enter judgment on the award." *Milk Drivers, Dairy and Ice Cream Employees, Laundry and Dry Cleaning Drivers, Clerical and Allied Workers, Local Union No. 387 a/w Int'l Brotherhood of Teamsters, AFL-CIO v. Roberts Dairy*, 294 F. Supp. 2d 1050, 1054 (S.D. Iowa 2003). In this matter, the parties' contract contains such an express provision in Article 14 of the

General Provisions:

The decision rendered by the arbitrator shall be final, judgment may be entered upon it in any Iowa court having jurisdiction thereof, and the award shall not be subject to modification or appeal.

Answer and Counterclaim, Doc. No. 5, Exh. A, § 14.1.5 at 58.

“The confirmation of an arbitration award converts the final arbitration award into the judgment of the court.” *Irving R. Boody & Co., Inc. v. Win Holdings Intern., Inc.*, 213 F. Supp. 2d 378, 380 (S.D.N.Y. 2002). “Under § 9 . . . , ‘the court must grant [a confirmation] order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.” *Domino Group, Inc. v. Charlie Parker Mem’l Found.*, 985 F.2d 417, 419 (8th Cir. 1993); *see also Gas Aggregation Servs., Inc. v. Howard Avista Energy, L.L.C.*, 319 F.3d 1060, 1064 (8th Cir. 2003) (“so ‘long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,’ arbitration awards must be confirmed”) (quoting *Bureau of Engraving, Inc.*, 284 F.3d at 824); *Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987) (“Absent a statutory basis for modification or vacatur, the district court’s task [is] to confirm the arbitrator’s final award as mandated by section 9 of the Act.”). However, the court has no power to *selectively* confirm an award absent a statutory basis in sections 10 or 11 of the FAA to vacate, modify or correct the award. *See UHC Mgmt.Co.*, 148 F.3d at 999 (“On a motion for confirmation, we have no power to selectively modify the award to delete such an order from the panel’s decision unless one of the circumstances detailed in section[s] 10 or] 11 of the FAA applies.”). As NCC’s motion for confirmation of the award seeks selective confirmation of all parts of the award *except* attorneys’ fees, and as this court has already determined that there is no statutory basis for vacating, modifying or correcting the arbitration panel’s denial of NCC’s claim for attorneys’ fees, NCC’s motion for

confirmation must be **denied**.⁵ *See id.*

C. Post-Arbitration Attorneys' Fees

1. Arguments of the parties

In its application for attorneys' fees NCC asserts that it is entitled to post-arbitration attorneys' fees in connection with seeking confirmation and enforcement of the arbitration award. SELC claims that the issue is moot, but asserts that NCC has provided no basis upon which a claim for post-arbitration attorneys' fees could be predicated.

In its reply to SELC's resistance, NCC claims:

Even if the Court finds that NCC is not entitled to any award of attorneys' fees for arbitration, NCC is entitled to its attorneys' fees incurred in seeking enforcement of its mechanic's lien in this Court pursuant to Iowa Code § 572.32. The Arbitration Panel logically cannot have ruled on any post-arbitration fee issues.

NCC's Reply to Siouxland's Resistance to Pending Motions ("Reply"), Doc. No. 41, at 4. NCC also claims that the authority cited by SELC only establishes that the FAA does not contain any fee shifting provisions, and does not address the issue of whether NCC is

⁵As an aside, though the court agrees with SELC's position that in this instance, where there is no statutory basis for vacating, modifying or correcting the award, only summary confirmation is warranted, the same cannot be said for SELC's position that confirmation of the award is unwarranted where the award has been satisfied. The mere fact that SELC has satisfied its obligation under the arbitration award does not divest the court of authority to confirm the arbitration award—for satisfaction and confirmation are separate and distinct issues. *See District Council No. 9 v. APC Painting, Inc.*, 272 F. Supp. 2d 229, 239 (S.D.N.Y. 2003) (holding that the fact that the defendant had satisfied the arbitration awards was irrelevant to whether the court should confirm the awards under 9 U.S.C. § 9).

entitled to post-arbitration attorneys' fees. Additionally, NCC submitted the affidavit of Webb L. Wassmer, which asserts that NCC incurred \$4,205.89 in post-arbitration attorneys' fees in connection with the filing of the pending motions. *See* Amended & Substituted Affidavit of Webb L. Wassmer Regarding Attorneys' Fees and Expenses, Doc. No. 45, at 1-2.

2. Resolution

The FAA does not contain any provisions providing for awards of attorneys' fees to successful or prevailing parties. *Menke v. Monchecourt*, 17 F.3d 1007, 1009 (7th Cir. 1994) (“[T]here is nothing in the Federal Arbitration Act which provides attorneys' fees to a party who is successful in seeking confirmation of an arbitration award in the federal courts.”); *see Harter v. Iowa Grain Co.*, 220 F.3d 544, 557 (7th Cir. 2000) (citing *Menke* for the same principle); *Raytheon Co. v. Computer Distrib., Inc.*, 632 F. Supp. 553, 560 (D. Mass 1986) (noting that the FAA “does not expressly provide for an award of attorneys' fees in arbitration proceedings.”). Therefore, an independent basis, aside from the FAA, must exist to support an award of attorneys' fees—such authority can arise from either the parties' contract, or from the statutory scheme that predicates the underlying claim.

In this instance, there is nothing in the parties' contract which provides for an award of attorneys' fees to the party prevailing in arbitration, therefore the only grounds under which NCC could claim attorneys' fees are statutory. The only available authority for awarding post-arbitration attorneys' fees in this matter is Iowa Code § 572.32, which addresses awarding attorneys' fees to a party that prevails in seeking enforcement of its mechanic's lien:

In a court action to enforce a mechanic's lien, if the plaintiff furnished labor or materials directly to the defendant, a

prevailing plaintiff *may* be awarded reasonable attorney fees.

IOWA CODE § 572.32 (2004) (emphasis added). Notably, the statute does not mandate an award of attorneys' fees to the prevailing party—rather, it is permissive in that the court could find that even a prevailing party would not be entitled to reasonable attorneys' fees. *See id.* The arbitration panel, without expressly determining whether or not NCC was a 'prevailing party,' already determined that NCC was not entitled to an award of attorneys' fees incurred prior to the issuance of the final award. Given the arbitration panel's denial of attorneys' fees to NCC, and as NCC has not prevailed on any of its motions currently pending, the court does not think NCC is entitled to an award of post-arbitration attorneys' fees. In fact, it would appear wholly inconsistent for the court to deny NCC's motion to vacate, correct or modify the arbitration award with respect to the award's denial of NCC's claim for attorneys' fees, and then turn around and award NCC post-arbitration attorneys' fees. Therefore, NCC's application for attorneys' fees, to the extent it seeks post-arbitration attorneys' fees, is **denied**.

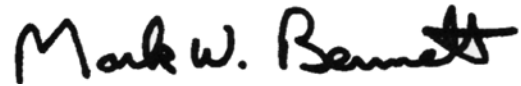
III. CONCLUSION

For the foregoing reasons, the motions pending before this court are disposed of as follows:

- NCC's Motion to Modify, Correct or Vacate Arbitration Award Re: Attorneys' Fees (Doc. No. 32) is **denied**.
- NCC's Application for Award of Attorneys' Fees (Doc. No. 34) is **denied as moot** as to all attorneys' fees incurred prior to the final arbitration award, and is **denied** inasmuch as it claims post-arbitration attorneys' fees.
- NCC's Motion to Confirm Arbitration Award and Request for Entry of Judgment of Foreclosure (Doc. No. 28) is **denied**.

IT IS SO ORDERED.

DATED this 26th day of October, 2004.

A handwritten signature in black ink that reads "Mark W. Bennett". The signature is written in a cursive style with a prominent "M" and a stylized "B".

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA